Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter Of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	
Statement on Comparative	)	
Broadcast Hearings	)	

REPLY COMMENTS OF BLACK CITIZENS FOR A FAIR MEDIA, CENTER FOR MEDIA EDUCATION, NATIONAL ASSOCIATION FOR BETTER BROADCASTING, PHILADELPHIA LESBIAN AND GAY TASK FORCE, TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, DC CHAPTER OF THE NATIONAL ASSOCIATION OF PUERTO RICAN WOMEN, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST

Of Counsel:

Laura Rovner
Graduate Fellow

Bettina Pruckmayr
Jim Black
Student Interns

Angela J. Campbell
Citizens Communication Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Andrew Jay Schwartzman
Gigi Sohn
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

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SUMMARY

BCFM *et al.* continues to support the Commission's proposal to adopt an extended holding period applicable to all existing and future licensees that acquire their licenses through the comparative hearing process and urge the Commission to immediately initiate a rulemaking to extend the anti-trafficking rule to all licenses, regardless of how obtained. We submit these reply comments in answer to four points raised by other commenters.

First, application of the holding period to existing applicants and licensees would not constitute the type of illegal retroactive rulemaking present in *Bowen v. Georgetown University Hospital*. At most, the proposed rule is secondarily retroactive, *i.e.*, affecting past transactions but having solely future effect. If application of the extended holding period to present licensees is secondarily retroactive, it is nonetheless justified because it passes the reasonableness requirement. The waiver provision will substantially mitigate any burden which applying the extended holding period would place on existing licensees. Moreover, as we have shown in our previous comments, to not apply the rule across-the-board would be contrary to the public interest. The longer a licensee remains in a community, the better able it is to understand the needs and interests of that community. Additionally, if licensees know they must retain their licenses for an entire license term, they will be more inclined to invest in community issue-oriented and children's programming.

Second, some commenters argue that an across-the-board application of the anti-trafficking rule would be harmful because it may discourage settlements. Even if this wholly unsubstantiated claim were true, the commenters fail to take into account the significant benefits to the public in holding applicants to their promises.

Third, we disagree with NAB's argument that a voluntary preference would be better than a mandatory rule. A rule is more equitable because it prohibits all licensees from trafficking. Requiring every broadcaster to hold on to its license is also better for the public because it assures greater continuity of service from the best qualified licensees as determined by the comparative hearing process. In addition, a mandatory holding rule is more likely to deter "sham" applications than a voluntary preference. From 1962 to 1982, waivers to the three-year holding rule were granted only after the Commission assured itself that there was no evidence of trafficking. If broadcasters know that the Commission will check every waiver application, traffickers may be dissuaded from even applying for a license. A rule is also better for the Commission because the requirement of requesting a waiver alerts the Commission to any possible trafficking before it takes place.

Finally, we urge the Commission to immediately issue a FNPRM to determine whether the extended holding period should be applied to all licenses, regardless of how they are obtained. The data we presented in our prior comment raises sufficient concern of the existence of trafficking to warrant re-examination of the need for an anti-trafficking rule that would be applicable to all licensees.

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Black Citizens for a Fair Media, Center for Media Education, National Association for Better Broadcasting, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, D.C. Chapter of the National Association of Puerto Rican Women, and Office of Communications of the United Church of Christ (collectively referred to here as, BCFM *et al.*), by their attorneys, submit these reply comments in further response to the above-captioned proceeding released August 12, 1993.

BCFM *et al.* continues to support the Commission's proposal to adopt an extended holding period applicable to all existing and future licensees that acquire their licenses through the comparative hearing process and urges the Commission to immediately initiate a rulemaking to extend the anti-trafficking rule to all licenses, regardless of how obtained. We submit these reply comments in response to four points raised by other commenters.

I. Applying the Extended Holding Period to Existing Licensees Does Not Constitute Unlawful Retroactive Rulemaking.

Several of the commenters oppose applying the extended holding period to existing

licensees. *See, e.g.* New Miami Latino Broadcasting Corp. Comments at 4 (New Miami), August Communications Inc. comments at 9 (August), Rex Broadcasting Corp. Comments at 3,4 (Rex). Citing *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), they claim that such application would constitute unlawful retroactive agency rulemaking. As we show below, applying the longer holding period to existing licensees does not constitute retroactive rulemaking such as that at issue in *Bowen.*

The specific question before the Supreme Court in *Bowen* was whether the Secretary of Health and Human Services had the authority under the statute to retroactively implement a cost-limit rule and thereby collect reimbursement payments from several hospitals. The rule had been implemented once in 1981 and found to be invalid by the United States District Court for the District of Columbia because of the Secretary's failure to follow proper rulemaking procedure. When the Secretary then reinstated the rule in 1984, she applied it retroactively to cost assessments made since July 1, 1981. *Id.* at 207. This allowed her to take back over $2 million from several hospitals which they had been entitled to under the old rule but were no longer entitled to under the new rule. *Id.* at 207. Had the rule been upheld, it would have had the effect of making the previously lawful receipt of certain sums of money by the hospitals retroactively unlawful. *See id.* at 207.

Comparing the facts of *Bowen* to the present situation, the new FCC regulation would be retroactive only if it were to make past station sales unlawful. This, however, is not the case. Applying the extended holding period to existing licensees in no way affects the legality of past sales. The proposed rule merely sets a minimum time limit licensees must wait before they can transfer or assign their newly acquired licenses in the future. Therefore, the rule is

truly regulating future, not past actions. Consequently, application of the extended holding period to existing licensees is not retroactive rulemaking, and *Bowen* does not apply.

At most, the rule proposed by the Commission consists of what Justice Scalia has labeled "secondary retroactivity." *Bowen*, 488 U.S. at 219 (Scalia, J., concurring). Justice Scalia distinguished between retroactive rules, which "alter *past* legal consequences of past actions," and secondarily retroactive rules, which have exclusively future effects but do affect past transactions. *Id.* at 219 (emphasis in original). It is well established that rules with only secondary retroactivity will be upheld as long as they are reasonable. *Id.* at 220.

Here, application of the holding period to existing licensees is clearly reasonable. Indeed, Justice Scalia cites *General Telephone Co. of Southwest v. United States*, 449 F 2d. 846, 863 (1971), as an example of a case where a rule with retroactive effects was upheld as reasonable. As we pointed out in our earlier comments, *General Telephone* is similar to this case in that failure to extend the rule to existing licensees would be counter to the fundamental purpose of the rule.[1] BCFM *et al.* Comments at 26-27. Moreover, the alleged adverse effects

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[1] New Paltz Broadcasting (NPB) admits that across-the-board application would be reasonable if there were recognizable public interest benefits, but asserts that there are none. NPB Comments at 2. Contrary to the claims made by NPB, however, the public will benefit significantly from the application of the extended holding period to existing licensees. First, as the Commission itself has found, it takes time to gain an understanding of a community's programming needs and interests and more time to implement proposals aimed at meeting those needs and interests. *Amendment of Part I of the Commission's Rules Adding Section 1.365 Concerning Applications for Voluntary Assignments or Transfers of Control*, 32 FCC 689,690 (1962). The longer a broadcaster holds a particular license the better able it will be to serve the public interest of the community in which it operates. Second, if a broadcaster knows that it will have to undergo a license renewal, it will be more inclined to invest its resources in community responsive programming. As we have shown in our comments, traffickers who are only interested in short term profiteering and therefore have no need to build audience loyalty tend to cut community and children's programming since these are more expensive to produce than entertainment programming and tend to produce less revenue. BCFM *et al.* Comments at

in *General Telephone* -- divestiture of cable systems -- were much harsher than those alleged here. *Id.* at 27.

Here, the fact that "permittees may have made financial or business commitments based on the expectation that this one year holding period would continue to apply," Federal Communications Bar Association (FCBA) Comments at 6, is irrelevant. As Justice Scalia explains, a rule with future effect can affect past transactions.[2] Nor is it relevant that some licensees may have already signed contracts for the full or partial transfer of a license held less than the new holding period. *See, e.g.* Rex Comments at 2. As Justice Scalia notes in *Bowen,* "there is no question that the Secretary could have applied her new wage-index formulas to respondents in the future, even though respondents may have been operating under long-term labor and supply contracts negotiated in reliance upon the pre-existing rule." 488 U.S. at 220 (emphasis added).

The Commission itself in other contexts has made rules effective even where pre-existing contracts were affected. For example, the Commission denied a request for complete grandfathering of contracts of children's programming entered into before the effective date of the children's television rules. *Policies and Rules Concerning Children's Television* 6 FCC Rcd 5093 (1991). The Commission found that to excuse compliance because of existing contracts would jeopardize effective implementation of the new rule. *Id.* at 5102. In the same way, contracts for sales of stations before expiration of the holding period should not be grandfathered

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[2] The example Justice Scalia gives is that taxation of future trust income can render previously established trusts less desirable. 488 U.S. at 220.

absent a showing of good cause.

If the application of the rule in a particular case would result in undue hardship, the Commission is of course free to waive the rule. Such waiver requests will not create an administrative burden because, as Rex Broadcasting Corporation (Rex) itself acknowledges on page two of its comment, the class of licensees affected (those who have held their licenses for a short time and have already signed a contract for transfer) is relatively small. Similarly, if a licensee such as New Miami can show that it is no longer capable of financing the operation of the station, New Miami Comments at 5, a waiver could be granted by the Commission.

In conclusion, applying the extended holding period to existing licensees does not constitute retroactive rulemaking such as that in *Bowen*. At most, application of the rule to existing licensees consists of secondary retroactive rulemaking, and the secondary retroactivity is justified because the application is reasonable and better advances the public interest.

II. Application of Longer Holding Periods to Licenses Obtained Through Settlement in a Comparative Process Will Further the Commission's Public Interest Goals.

Two or perhaps three[3] commenters oppose the concept that parties obtaining authorization via settlement in a comparative hearing should be subjected to any holding period. The FCBA simply ignores the current ambiguity of policies in this area, acting as if it would be a change in established law to require settling parties to live up to their integration and

[3] Through the miracle of word processing, Todd Robinson's comments echo, verbatim, the views of the commonly represented NPB. Indeed, Robinson appears to have mistakenly put his own words in the mouth of NPB, stating "NPB (*sic.*) also opposes application of the three-year holding period . . . ." Robinson Comments at 2.

divestiture commitments and to operate their stations for a full year.[4] NPB does not go so far, but argues that such a policy should be adopted prospectively. NPB Comments at 3.

Neither the FCBA nor NPB address the underlying goals of FCC comparative hearing and ownership policies, arguing primarily that there will be efficiencies gained through permitting immediate sale of stations obtained via settlement. Their argument is based on the unsupported -- and unsupportable -- assertion that such a policy would encourage settlements that would not otherwise take place. Even if this were true, the comments make no effort to balance the significant loss in diversity which would inevitably result.

Based on its aggressive reading of FCC policy, the FCBA makes the extraordinary claim that it is somehow unfair to bind applicants to promises they had themselves voluntarily undertaken to make. FCBA Comments at 3. The FCBA also argues that settlements often involve unstable "shotgun weddings" among applicants. *Id.* at 4. If, as the FCBA suggests, the "surviving" applicant is unlikely to function properly, it is inconceivable that the initial grant of its application can be found to have been in the public interest.

The FCBA's position on settlements is fundamentally at odds with the basic premise of its comments. In its comments, the FCBA states that it sees no "compelling reason for the imposition of any holding period" except "where the integrity of the Commission's processes is . . . at stake, . . ." *Id.* at 9. However, as we have shown, failure to clarify the policy will permit parties to benefit from integration and diversification claims that they have no present intention to fulfill at the expense of the listening and viewing public. This very much challenges

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[4] Reed, Smith, Shaw and McClay (RSSM) agree with BCFM *et al.* that the law is otherwise. *See* RSSM Comments at 4, fn 1.

the integrity of the Commission's processes and thus it is impossible to imagine a more "compelling reason," for imposition of a holding period.

III. A Mandatory License Holding Period is Necessary to Prevent License Trafficking and is Preferable to a Voluntary System.

In its comments, the National Association of Broadcasters (NAB) argues that service continuity would be best promoted through a system that awards a significant preference to applicants that volunteer to commit to operating a station for at least three years. NAB Comments at 3. We believe that a mandatory holding period is superior to a voluntary preference for several reasons.

First, implementing a mandatory rule is more equitable than awarding a preference for a voluntary commitment because it prohibits trafficking by all licensees. Under a voluntary system, there is no assurance that the entity awarded the license will be subject to a meaningful holding period because there is no guarantee that all applicants will "volunteer" not to sell their licenses or that the applicant making that commitment will be awarded the license. Thus, a voluntary system would leave some licensees able to sell their licenses after one year and others unable to do so. This result is unfair. It is also harmful to the public because the community loses its assurance that the applicant selected in the comparative hearing as the best qualified to serve it will actually operate the station for any length of time.[5]

Moreover, to the extent that all applicants might promise to hold their stations as the

[5] Some commenters take issue with the ability of the comparative criteria to lead to selection of the best applicant. *See, e.g.*, Bechtel Comments at 4, NAB Comments at 4. The merits of the comparative hearing criteria are the subject of another NPRM in this docket. Thus, their concerns are best addressed in that context, rather than in the response to this Further Notice.

NAB suggests, NAB Comments at 6, the NAB's argument that voluntary commitments would help the Commission make comparative judgements, NAB Comments at 6, is undermined. If all applicants promise to hold their licenses for three years, the result would be the same as if there were a mandatory rule, and therefore, there might as well be one. However, if not all applicants promise to hold their licenses for three years, the anti-trafficking effect of the rule is lost.

Second, a mandatory rule would better deter "sham" applicants that undermine the comparative hearing process. The NAB claims that "sham" applicants will not be deterred under a mandatory rule because of the common knowledge of the Commission's leniency in granting waivers under the old three-year rule. NAB Comments at 3. However, the NAB offers no factual data to support this conclusion.

During the years when the three-year rule was in effect, the Commission did grant waivers for licensees wishing to transfer their licenses before the end of the three-year holding period. A review of the Commission's decisions regarding trafficking waivers from 1962 to 1982 reveals that transfer applications were granted by the Commission for a variety of reasons, but only if there was no evidence of trafficking. *See, e.g., Central Arkansas Broadcasting Co., Inc.*, 3 RR 2d 287, 290 (1964) (waiver granted where transfer arose from a bona fide dispute which led to the withdrawal of the subscribers for a majority of the stock of the licensee and there was no disruption of service or element of trafficking present); *Panax Corp. WGMZ (FM),* 2 FCC 2d 591, 591 (1966) (transfer approved where a majority of former owners retained an interest in the station and remained active in management, and there was no disruption of services, or element of trafficking present); *Star Broadcasting Corp.*, 25 FCC 2d 463, 466

(1970) (waiver was warranted in light of the continuing operating losses and the loss of the services of a one-third owner and experienced broadcaster who was in overall charge of the station); *Turner Communications Corp.*, 23 RR 2d 1046, 1046 (1972) (rule waived where assignor, who was suffering considerable losses and wished to sell his AM station in order to devote his resources to his TV station, would not profit from the assignment); *McClatchy Newspapers,* 76 FCC 2d 324, 330 (1980) (waiver granted where transfer was done solely for the purpose of estate planning of the licensees and for no other purpose); Thus, because the Commission examined all of the circumstances surrounding each proposal for good cause, licensees without a valid reason for a waiver presumably did not even apply. If, however, as the NAB suggests, the Commission was too lenient in its granting of waivers in the past, NAB Comments at 9, there is no reason why the Commission could not apply stricter requirements for waivers under the new rule.

Third, adoption of a rule rather than a voluntary commitment will be more effective and easier to administer. With a mandatory rule the licensee must obtain a waiver to transfer its station and the burden is on the licensee to show that it is eligible for a waiver. Therefore, the Commission will be immediately alerted to any deviation from the rule. With a voluntary commitment, however, it is not clear how the process will work. For example, how will the Commission know if a transfer application involves a station that is under a voluntary commitment? And, what will happen when licensees break their promises not to sell their stations?

For a voluntary commitment system to have any impact at all, the Commission would need to amend §73.1620(g) to require that stations report their voluntary commitments at the

same time they apply for a transfer. This would enable the Commission to determine quickly and easily whether a proposed transferor had made a comparative hearing promise to hold the station. However, the Commission would still need to determine whether there was good cause for breaking the commitment,[6] and to determine what the consequences should be if there is no good cause. Without such reporting requirements, and without any consequences for breaching promises to hold stations, a voluntary commitment system is completely meaningless.

IV. The Commission Should Issue a FNPRM to Determine Whether the Extended Holding Period Should Be Applied to All Licenses Regardless of How Obtained.

The NAB also argues that there is no evidence of trafficking since the repeal of the anti-trafficking rule in 1982, and as such, there is no need for the re-imposition of the general anti-trafficking rule. NAB Comments at 9. However, the data and analysis presented in our prior comments, BCFM *et al.* Comments at 7, demonstrate that the repeal of the anti-trafficking rule has caused enough harm to the public to warrant a re-examination of the need to reimpose an across-the-board anti-trafficking rule.

As detailed in our earlier comments, there is overwhelming evidence of station trading since the repeal of the rule in 1982 - trading that would constitute trafficking under the three-year rule. BCFM *et al.* Comments at 7. Station sales statistics from 1982 to 1992 indicate that immediately following the repeal of the anti-trafficking rule, the broadcasting market became very unstable. Beginning in 1983, the market experienced cycles of heavy trading and inflated prices ("booms") followed by market crashes ("busts"). *Id.* Comments at 10. There is also

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[6] This could result in the Commission having to engage in hearings similar to those for waivers under a mandatory rule.

considerable evidence that a significant number of stations traded since the repeal of the anti-trafficking rule were held for less than three years. *Id.* at 10.

The NAB argues that the decline in broadcast station prices following the initial surge in the early 1980's demonstrates that "the presence or absence of the anti-trafficking rule had no appreciable impact upon station prices." NAB Comments at 9. Although the NAB is correct that station prices fell after their initial rise, this is not evidence of the rule having no impact.

For one thing, prices and sales volume, which remained relatively constant while the three year rule was in effect, became quite volatile after its repeal. From 1972 to 1982 the sales statistics reflect stability in the market, while statistics for the years following the repeal of the rule show a clear pattern of instability, caused by rapid trading, in both the radio and television markets. BCFM *et al.* Comments at 8. While the pattern of "booms" and "busts" is most obvious in the graphs depicting television station prices, BCFM *et al.* Comments at 9, radio stations are experiencing the same unstable cycles. BCFM *et al.* Comments at 10.

In addition, even though radio station prices appear to have declined steadily after hitting their peak in 1988, more recent figures indicate that radio station prices are once again on the rise. Julie A. Zier, *Station Prices Up Sharply Over 1992*, BROADCASTING AND CABLE, September 6, 1993, at 40 (radio station prices are currently at an all time high). Also, there is considerable evidence that both radio and television station sales are heading into another "boom" cycle with station sales on the upswing. *See, e.g.*, Elizabeth Jensen, TV, *Radio Station Sales Are Getting Good Receptions*, Wall St. J., August 20, 1993, at B4. *See also*, *NAB Survey Shows TV Station Profits Increased in 1992*, COMMUNICATIONS DAILY, October 15, 1993, at 4. Thus, the contrast between the experience with and without an across-the-board anti-

trafficking rule provides support for its reintroduction.

NAB claims, without citing any support, that the rule had no effect in the past because "in every instance in which the rule would have applied, the Commission waived it." NAB Comments at 9. The NAB fails to consider, however, that the Commission granted waivers only after determining that each applicant had good cause for transferring before the end of the three-year holding period. *See supra* page 8,9. Moreover, even if the NAB is correct in its assertion that the Commission granted every waiver request that came before it from 1962 to 1982, NAB Comments at 9, that does not mean that the rule had no effect on trafficking. It is quite possible that the mere existence of the rule prevented traffickers from applying for waivers, license transfers, or even licenses in the first place. The smaller number of sales occurring when the rule was in place suggests that it in fact had this effect.

Finally, some commenters argue that an across-the-board application of a longer holding period would be difficult to administer and costly to the Commission. *See, e.g.*, NAB Comments at 10, FCBA Comments at 7. Specifically, these commenters are concerned that the adoption of a mandatory rule would result in the Commission being flooded with waiver applications for transfers of existing licenses. NAB Comments at 10.

This concern is unwarranted. First, the Commission is well able to enact strict waiver requirements that will discourage licensees that do not meet the criteria from applying. Second, the adoption of a mandatory across-the-board rule will likely result in a corresponding reduction of transfer requests that will have to be considered by the Commission. Thus, adoption of a rule should have little net effect on the use of the Commission's resources.

CONCLUSION

For the above reasons and those explained in our earlier comments, we strongly urge the Commission to adopt a mandatory rule requiring licenses to be held for a full license term, and to apply that rule to existing licensees as well as to future licenses obtained after a comparative hearing or as the result of a settlement. We also urge the Commission to promptly initiate a proceeding to apply a holding period to all licenses, regardless of how they are obtained. To prevent hardship and to minimize administrative burden, the Commission should spell out in advance the criteria for waiver of the rule.

Respectfully submitted,

Angela J. Campbell
Citizens Communication Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Andrew Jay Schwartzman
Gigi Sohn
Media Access Project
2000 M Street, N.W.
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